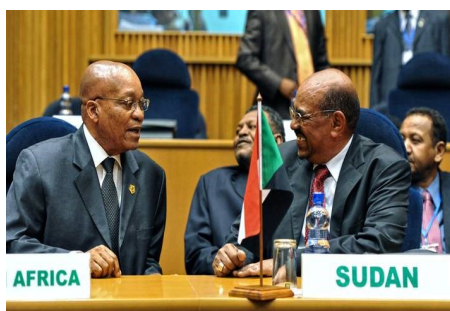


CCS COMMENTARY:

South Africa's relationship with the International Criminal Court: moving closer to the BRICS?

Important debates are taking place in South Africa as well as within the African Union (AU) as a whole about the future of Africa's participation in the International Criminal Court (ICC), which was set up in 1998 to help end impunity for the most serious crimes of concern to the international community. South Africa claims to be considering a withdrawal from the ICC, and its Supreme Court of Appeal (SCA) is debating whether or not the country is required to arrest incumbent African presidents who have been indicted by the ICC. Both moves would signal a shift away from the European stance on the ICC, moving South Africa closer towards the position of fellow BRICS members China, Russia and India.



Although February 12th was dominated by the commotion surrounding Jacob Zuma's State of the Nation Address, it also marked a key date for the future of South Africa's participation in the ICC. The South African SCA started its deliberations on the order of the High Court to arrest Omar al-Bashir, the president of Sudan, who is wanted by the ICC for several counts of genocide, crimes against humanity and war crimes. In June 2015, the High Court ruled that South Africa, a signatory of the Rome Statute that governs the ICC, had the duty to arrest al-Bashir while he attended the 25th AU Summit in Johannesburg. The South African

government, however, allowed al-Bashir to leave the country, arguing that his immunity as a sitting president of a sovereign state protects him from arrest. The SCA's decision on the matter will be decisive.

Opposition against the ICC within the AU

Looking beyond South Africa presents further evidence that 2016 has already been a tumultuous year for African relations with the ICC. At the AU Summit in Addis Ababa at the end of January, which happened to coincide with the start of the ICC trial of former Ivory Coast President Gbagbo, Uhuru Kenyatta of Kenya (himself a former ICC suspect) presented a proposal for African countries to withdraw from the Court. The proposal received a positive reception from other African leaders, who have long voiced concerns about a strong bias from the ICC towards African war criminals and about the application of double standards. Of the ten countries currently under investigation by the ICC, nine are African.

Some media reports have gone as far as stating that "African countries are on the brink of exiting the ICC", yet this conclusion appears premature. Thus far, African leaders have only mandated the AU Open-ended Committee of African Ministers on the ICC to consider a roadmap on possible African withdrawal from the ICC. It remains to be seen, therefore, what will happen in June, when the Committee reports back. Ultimately, the decision whether or not to withdraw from the ICC is a national one, to be taken by each state individually. Jacob Zuma, for one, stated at the end of the AU Summit that "South Africa is seriously reviewing its participation in the Rome Statute and will announce its decision in due course". It can be expected, therefore, that the decision reached by the SCA on South Africa's responsibilities in the al-Bashir case will also have repercussions on the future orientation of South Africa towards the ICC.

The ICC and South Africa's international partners

The fact that South Africa is now playing a leading role in African plans to withdraw from the ICC is bad news for the European Union (EU), one of the strongest supporters of the ICC on the international scene. The EU

regards South Africa as a key partner in the continent. When European and South African leaders held a Summit in 2010, their Joint Communiqué still confidently stated that: “We reaffirmed that the fight against impunity is a common endeavour, anchored in our common values. In this context, we consider that the Rome Statute and the ICC constitute an important development for international justice and a basis to advance peace. We reiterate the importance of the independence and integrity of the ICC and all of its organs”. This view was reinforced at the AU Summit in 2013, where it was South Africa that urged other African countries not to leave the ICC.

The developments in recent months, however, appear to indicate that at least in rhetoric, South Africa is moving away from the European stance and closer to the position of its fellow BRICS members regarding the ICC. While Brazil is, like South Africa, a signatory of the Rome Statute, China, Russia and India have all kept their distance from the Court. Russia has signed (but not ratified) the Statute. China and India have consistently opposed membership of the ICC, having neither signed nor ratified. Russia and China have, moreover, in their capacity of permanent members of the United Nations Security Council, vetoed a 2014 resolution to refer those responsible for war crimes and crimes against humanity in Syria to the ICC, making such a referral impossible. And despite the ICC arrest warrant against al-Bashir, both China and India welcomed him to their country in 2015.

The position of China towards the ICC is especially interesting, and hence deserves some further discussion. While China has voiced interest in and support for the Court, and especially for the more abstract idea of an international criminal court, it has expressed strong reservations about the ICC’s current functioning. These reservations have addressed amongst other the universal jurisdiction of the Court and the scope of the crimes to fall under its jurisdiction. At the core of the Chinese opposition lies a fear that the Court, because of its prosecutorial discretion, can be used as a political tool for intervention in the internal affairs of states, thereby serving Western political goals and interests. Such bias in the Court’s operations is exactly what various African leaders have been lamenting in recent years.

These shared concerns have repeatedly been voiced in the action plans and declarations resulting from the Forum on China-Africa Cooperation (FOCAC) conferences between Africa and China. While none of these documents mentions the Court by name, they have offered a key forum to formulate common views on appropriate international responses to human rights violations and war crimes. Two main positions stand out. First, while stressing that Africa and China respect the principle of the universality of human rights, it is made clear that, “The two sides oppose politicization and double standards in the field of human rights”. Second, the principles of sovereignty and non-intervention are emphasized, even in conflict situations. According to the 2012 Beijing Action Plan, for instance, “The two sides expressed their appreciation of the leading role of African countries and regional organizations in resolving regional issues ... and oppose the interference in Africa’s internal affairs by external forces in pursuit of their own interests”. The growing ties between South Africa and its fellow BRICS members, thus, offer a supportive environment in which to voice a more critical approach to the ICC.

The recent developments in South Africa’s approach to the ICC seem to illustrate a convergence in rhetoric between South Africa on the one hand and key BRICS members, particularly China, on the other. South Africa is currently going through key processes for rethinking its relationship with the ICC, both domestically (through the SCA) and within the AU. The coming months will bring more clarity on its future course of action

Floor Keuleers
Visiting Scholar
Centre for Chinese Studies
Stellenbosch University



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